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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1685~~ 70-151

PROCEEDING No. 1

IN THE MATTER OF THE APPLICATION

OF

JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules

against

PUBLIC EMPLOYMENT RELATIONS BOARD, OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK, and the CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondents.

PROCEEDING No. 2

IN THE MATTER OF THE APPLICATION

OF

JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated, and COUNCIL 50, AFL-CIO,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules

against

OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK, PUBLIC EMPLOYMENT RELATIONS BOARD and the CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT

WILLIAM GOFFEN,
150 Broadway,
New York, N. Y. 10038,
Counsel for Petitioner.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT

The petitioner JOHN J. KRAEMER respectfully prays that a writ of certiorari issue with respect to Proceeding No. 1 above entitled to review the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered in the above proceedings on December 14, 1970.

Opinions Below

The opinion of the Supreme Court of the State of New York at Special Term, Albany County, dismissing the petitions is reported at 63 Misc. 2d 708 and appears in the Appendix hereto. The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, affirming the order of Special Term, is reported at 35 A. D. 2d 297 and appears in the Appendix hereto. The Court of Appeals of the State of New York dismissed the appeal taken as of right to that Court by order entered March 4, 1971 upon the ground that no substantial constitutional question is directly involved. The Court of Appeals denied a motion for permission to appeal on April 14, 1971 without opinion.

Jurisdiction

A timely motion in the Court of Appeals of the State of New York for permission to appeal to that Court from the order of the Supreme Court of the State of New York, Third Judicial Department, dated and entered on December 14, 1970, was denied by order dated and entered on

April 14, 1971, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. Section 1257(3).

Questions Presented

Whether the grant of exclusive payroll deduction of insurance premiums by the State of New York to a majority union of public employees is constitutionally discriminatory as a denial of due process and of the equal protection of the laws to the members of a minority union of public employees.

Whether the State of New York as an employer is exempt from constitutional inhibitions requiring due process and equal protection because private employers are exempt from such inhibitions.

Statutory Provisions Involved

Civil Service Law, Article 14 (Taylor Law), Sections 200, 202, 209-a;
Executive Law, Section 654;
Laws of 1970, Chapter 458, Section 9;
United States Constitution, Amendments 1 and 14;
New York Constitution, Article 1, Section 6.

The pertinent text of the foregoing citations is set forth in the Appendix.

Statement of the Case

In January 1970 the State of New York included in a collective bargaining contract with Civil Service Employees Association, Inc. (CSEA) a clause extending the exclusive services of the State to CSEA in deducting membership dues and insurance premiums from salaries of consenting members of CSEA. The clause reads as follows:

> CSEA shall have exclusive payroll deduction of membership dues and insurance premiums with this privilege accorded to no other employee organization in the four units in which CSEA is certified.

The petitioner, Council 50, AFL-CIO, with 15,000 State employees comprising its membership sought in the above Proceedings to require the State to continue these services when requested by State employees whether or not they belong to CSEA. In Council 50's case, employees have had their membership dues deducted from their payrolls at their request for the past fourteen years. They have had their insurance premiums similarly deducted for the past seven years.

The petition in Proceeding No. 1 alleged that the extension of any exclusive privilege of deduction of insurance premiums "constitutes a deprivation of due process of law and of equal protection of the laws in violation of the United States Constitution, Amendment 14 and of the New York Constitution, Article 1, Sections 6 and 11" (Petition, par. 14).

The petition in Proceeding No. 2 (review of which is not sought by the instant petition) seeks to enjoin discontinu-

ance of the State's services in withholding employee membership dues at their request and remitting them to Council 50 and likewise raises constitutional questions as follows:

> The purported exercise of authority in extending exclusive check-off privileges to CSEA thereby depriving petitioner Council 50 AFL-CIO of such privileges, is arbitrary, capricious, discriminatory and unlawful and constitutes a deprivation of property without due process of law and of the equal protection of the laws in violation of the United States Constitution, Amendment 14, and of the New York Constitution, Article I, Sections 6 and 11. (Petition, par. 17)

Special Term apparently consolidated both proceedings and ruled:

> *Bauch* [*Matter of Bauch* v. *City of New York*, 21 N. Y. 2d 599, cert. den. 393 U. S. 834] is consistent with the policy of the State and the check-off as contracted for herein and such did not deprive the Council of due process or equal protection of the laws; so, too, *Bucho Holding Co.* v. *State Rent Commission*, 11 N. Y. 2d 469, 477, and, *Gleason* v. *Gleason*, 26 N. Y. 2d 28, 41.

The Appellate Division, in its opinion affirming Special Term's dismissal of the petitions, did not comment on the constitutional issues though they were argued in the briefs of the parties and orally. When an appeal was taken on constitutional grounds as of right to the Court of Appeals,

that Court after argument dismissed the appeal on the ground that "no substantial constitutional question is directly involved. See *Matter of Bauch* v. *City of New York*, 21 N. Y. 2d 599."

Reasons for Granting the Writ

Review by this Court of the present issues should be helpful to all states in the newly developing area of collective bargaining rights for public employees, an area in which the precedents of private industry are not relevant. Taylor Law, Civil Service Law, Section 209-a(3).

Proceeding No. 1 concerning which certiorari is sought, presents the issue whether the long existing services of the State of New York in withholding insurance premiums at the request of any public employees who wish to be covered by any employee organization insurance plan may be arbitrarily and summarily discontinued without any hearing whatsoever pursuant to a collective bargaining agreement extending the privilege solely to members of one employee organization. Such discriminatorily extended, exclusive services by the State are in conflict with restraints on the government of due process and equal treatment.

Goldberg v. *Kelly*, 397 U. S. 254;
Rinaldi v. *Yeager*, 384 U. S. 305;
Brown v. *Louisiana*, 383 U. S. 131;
Renken v. *Compton City School District*, 207 Cal. App. 2d 106;

Board of School Directors v. *Wisconsin Employment Relations Board*, 42 Wisc. 2d 637;

The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment, by J. W. Waks, 55 Cornell Law Review 1004 (July, 1970).

The second proceeding protests the discriminatory restriction of long existing government services in withholding employee organization dues to members of a single organization as likewise violating due process and equal protection concepts. However, the instant petition does not seek review of Proceeding No. 2.

The concept of "exclusive recognition" is at the basis of the State's extension of exclusive premium deduction services. The concept may just as logically yet be extended by the State so as to limit employee withholding for United States savings bond purchases or community chest donations to members of a particular union.

The statutory policy of the State of New York with respect to collective bargaining by public employees is expressed in the Taylor Law (Civil Service Law, Sections 200 et seq., effective September 1, 1967). The statutory scheme of this statute is inconsistent with the concept of exclusive insurance premium deductions. Civil Service Law, Sections 200, 202, 209-a. All other New York legislation relating to insurance premium withholding in public employment is expressly made subject to the provisions of the Taylor Law. Executive Law, Section 654, the Laws of 1970, Chapter 458, Section 9.

There is a difference between the insurance programs offered by CSEA and those of Council 50. In CSEA's case, the insurance is carried by a private carrier (Travelers Insurance Company). The State accommodates the private carrier by issuing a check to it directly for premiums withheld. The State issues a separate check for dues.

Council 50 administers its own insurance plan. Therefore, the State issues one check to Council 50 for both dues and insurance, and the proceeds of the check are allocated by Council 50. The savings resulting from self administration of Council 50's insurance permit it to offer less expensive coverage than Travelers Insurance Company and, also, to impose no contestability period.

The instant decisions create the anomaly of judicial sanction of State accommodation of a private company while denying comparable services to public employees.

The discontinuance of premium and dues deductions creates irreparable injury. There is no way that such deductions may be made retroactively. By way of specific example, in another case pending in New York, *Kraemer* v. *New York State Thruway Authority,* the Appellate Division, Third Department, on February 19, 1971, granted a stay of discontinuance of deductions of insurance premiums and dues after the Thruway Authority, pursuant to a contract provision similar to the one presently at issue, had already interrupted this long standing practice. During the period of interruption, four employees of the Thruway died leaving their families without Council 50 provided life

insurance amounting to $12,000 in the aggregate. It was only Council 50's voluntary disregard of the default in premiums that led to payment of the lapsed policies.

In the *Board of School Directors* case, *supra*, the Wisconsin Court considered a statute which is like New York's Taylor Law in that it protects the right of public employees to form, join and participate in the employee organization of their choice. Civil Service Law, Section 202. That Court quoted approvingly from a ruling of the Wisconsin Employment Relations Commission:

> Those rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative.

The State's extension of exclusive premium deduction services to a majority union is not justifiable as a legitimate enhancement of union security in the public sector. The denial of premium deduction facilities to members of a smaller union neither adds to the security of the majority union nor stabilizes collective bargaining (unless entrenchment of the majority union so that it may never be overturned may be regarded as "stabilization").

Special Term in the instant case did not distinguish between "exclusive recognition" of the majority union as

bargaining agent for all of the employees in a bargaining unit, whether or not they belonged to the majority union, and the extension of benefits exclusively to members of the majority union when the effect is not to stabilize a bargaining relationship, but merely to entrench the majority union.

The Wisconsin Court evidently recognizes that the exclusive status of the certified union for the purposes of bargaining and executing an agreement with the public employer may not deprive an individual employee or a minority employee organization of constitutional guarantees.

Contrasting with the perceptive views of the Wisconsin Court, *supra,* the Courts and agencies of the State of New York have construed the Court decisions in the present cases as authorizing "exclusive recognition" of certified employee organizations in areas going even beyond employee organization premium and dues collections. Thus, in *Kraemer* v. *Office of Employee Relations,* Justice A. Franklin Mahoney at Special Term, Albany County, New York (opinion of July 21, 1970) sustained a provision of the present collective bargaining contracts limiting to CSEA exclusively the right to represent public employees who desire to petition the State for redress of employee grievances. It is certainly apparent that this extension of the concept of "exclusivity" as a guide to public employee rights may present serious questions under the First

Amendment of the United States Constitution with respect to the right to petition the government for redress of grievances.

The concept of "exclusive recognition" expressed by Special Term's opinion in the instant case has been seized upon by State agencies as authorization for a still further extension of exclusive privileges to members of CSEA only. For example, a memorandum dated March 9, 1971 from the Division of Employment of the State of New York to State employees advises:

> The negotiated agreements between the State and the Civil Service Employees Association grant to CSEA *exclusive* access during working hours to employees . . .

Certainly such pronouncement raises serious questions as to infringement of the First Amendment privilege of freedom of speech.

More recently, as an administrative extension of the judicial holding as to "exclusivity" in the present case, State agencies have been barring members of Council 50 from holding meetings or conducting lecture courses in State auditoriums or using the bulletin boards. This kind of discrimination may well conflict with the equal protection guarantee of the Fourteenth Amendment.

Special Term and the Appellate Division both cited *Matter of Bauch* v. *City of New York*, 21 N. Y. 2d 599, cert. den. 393 U. S. 834. The Court of Appeals also cited

Bauch in support of its brief statement dismissing the appeal on the ground that no substantial constitutional question is directly involved.

The *Bauch* case held that check-off by the City of New York on behalf of members of the majority union exclusively did not violate due process or equal protection guarantees because the practice is common in private industry. Yet, the private employer, unlike the State as employer, is not restrained by constitutional inhibitions from depriving employees of his services or from extending them to certain employees and not to others.

The notion that the government as employer is free of constitutional restraints in its collective bargaining relationships because private employers may be is actually extended by the present case beyond the holding of the *Bauch* case which was limited to the question of the right of the City of New York to grant exclusive check-off of union dues to a majority union, thereby discontinuing a long established practice of checking-off dues at employee requests to any union designated. That case did not involve the withholding of insurance premiums at all. Nevertheless, the three State Courts in deciding the present case all cite *Bauch* as though it also authorized exclusive services of the State in withholding insurance premiums. This expansion of the concept of *Bauch* is apparently based upon Special Term's holding that a public employer may "award exclusive recognition to the employee organization certified as the winner of a collective bargaining election."

As the result of Justice John M. Harlan's denial of applications for stays, check off of dues (including insurance premiums) has now been terminated, thereby burdening the membership of Council 50 with premium collection, bookkeeping and other expenses affecting adversely the soundness of the actuarial plan, as well as opening the door to premium defaults and lapse of insurance coverage to the detriment of 15,000 State employees.

CONCLUSION

For these reasons a writ of certiorari should issue to review the order and opinion of the Appellate Division of the Supreme Court of the State of New York, Third Department, insofar as it applies to Proceeding No. 1.

Respectfully submitted,

WILLIAM GOFFEN,
150 Broadway,
New York, N. Y. 10038,
Counsel for Petitioner.

Dated: New York, N. Y.
May 7, 1971.

APPENDIX

Memorandum Decision of Supreme Court, County of Albany

STATE OF NEW YORK SUPREME COURT

COUNTY OF ALBANY

No.

PROCEEDING No. 1

IN THE MATTER OF THE APPLICATION

OF

JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules

against

PUBLIC EMPLOYMENT RELATIONS BOARD, OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK,

Respondents,

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor-Respondent.

PROCEEDING No. 2

IN THE MATTER OF THE APPLICATION

OF

JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated, and COUNCIL 50, AFL-CIO,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules

against

OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, PUBLIC EMPLOYMENT RELATIONS BOARD and THE STATE OF NEW YORK,

Respondents,

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor-Respondent.

Memorandum Decision of Supreme Court, County of Albany

At Albany County Special Term, Albany, New York, May 22, 1970; No. 10.

APPEARANCES:

For the application:

WILLIAM GOFFEN, ESQ.
Attorney for Petitioner

In opposition:

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of New York, for the respondents.

DEGRAFF, FOY, CONWAY AND HOLT-HARRIS, ESQS.
Attorneys for Civil Service Employees Association, Inc. Intervenor-Respondent.

HUNT, J.

The petitioner in these two article 78 proceedings seeks to void part of each of the four collective bargaining agreements (effective April 1, 1970) entered into by the Office of Employee Relations (OER) for the State and the Civil Service Employees Association (CSEA) as the bargaining representative for the four units in which the latter was certified and to obtain a determination that Council 50 shall continue to have the privilege of the check-off of dues of its members.

The part in each contract to which objection is taken relates to "payroll deductions" and thereunder CSEA is granted "exclusive payroll deduction of membership dues and insurance premiums for employees and no other employee organization shall be accorded any such payroll deduction privileges."

BEST AVAILABLE COPY

Memorandum Decision of Supreme Court, County of Albany

Council 50 represents a minority of State employees, including a number in units for which CSEA is the exclusive representative, and complains that the result of the exclusivity provision is to prohibit the State Comptroller from continuing to deduct from the payroll checks of its members amounts for (1) insurance premiums (first proceeding) and (2) dues (second proceeding).

It appears that the Comptroller has never deducted insurance premiums, as such, but, has deducted members' dues and remitted to the Council. The latter has turned over part of the dues to an insurance fund set up by the Council and the balance was retained by it for its general purposes.

The second proceeding, like the first, seeks to void the exclusivity provision and to compel the Comptroller to continue payroll deductions of dues of its members.

The issue is over the authority of OER to enter into the exclusivity agreement with CSEA and to direct the Comptroller to end the deduction of dues from the payroll checks of Council 50 members.

It is no longer open to question that as the result of an election to determine a bargaining agent, an employer may award exclusive recognition to the employee organization certified as the winner and may make and execute written agreements with the latter. Such was done here and OER had the authority to contract with CSEA for exclusivity and the Comptroller is required to honor the contract and direction of OER as it affects him and his prior and future practices (*Executive Law*, section 654; *State Finance Law*, section 6-a.2; *Civil Service Law*, section 203; *Matter of Bauch* v. *City of New York*, 21 N. Y. 2d 599, cert. den. 393 U. S. 834). *Bauch* is consistent with

the policy of the State and the check-off as contracted for herein and such did not deprive the Council of due process or equal protection of the laws; so, too, *Bucho Holding Co.* v. *State Rent Commission,* 11 N Y 2d 469, 477, and, *Gleason* v. *Gleason,* 26 N Y 2d 28, 41.

Relief is not sought against PERB and the petitions in this respect are dismissed. The objections in point of law on behalf of OER are sustained. The petitions are dismissed. The papers may be obtained at Chambers. The Attorney General to submit orders.

Dated: Albany, New York
July 15, 1970

RUSSELL G. HUNT
Justice of Supreme Court

Opinion of Appellate Division, Third Department

#15903

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter

of

JOHN J. KRAEMER, Individually, and as President of Council 50, AFL-CIO,

Appellant,

against

ROBERT D. HELSBY *et al.*, Constituting the Public Employment Relations Board, *et al.*,

Respondents,

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor-Respondent.

(And 1 Other Proceeding.)

Argued, October 21, 1970.

Before:

HON. J. CLARENCE HERLIHY,
Presiding Justice,

HON. WALTER B. REYNOLDS,
HON. LOUIS M. GREENBLOTT,
HON. LAWRENCE H. COOKE,
HON. MICHAEL E. SWEENEY,
Associate Justices.

Opinion of Appellate Division, Third Department

APPEALS from a judgment of the Supreme Court at Special Term (Russell G. Hunt, J.) entered July 22, 1970 in Albany County, which dismissed petitioner's applications in proceedings under CPLR article 78 to enjoin the Comptroller of the State of New York from discontinuing the practice of check-off of union dues and of deducting insurance premiums from the pay of members of Council 50, AFL-CIO.

WILLIAM GOFFEN, for appellant, 150 Broadway, New York, New York.

LOUIS J. LEFKOWITZ, Attorney General (Ruth Kessler Toch and John Q. Driscoll, of counsel) for respondents, The Capitol, Albany, New York.

DE GRAFF, FOY, CONWAY & HOLT-HARRIS (James W. Roemer, Jr., of counsel) for intervenor-respondent, 90 State Street, Albany, New York.

OPINION FOR AFFIRMANCE

GREENBLOTT, J.

These are appeals from a judgment of the Supreme Court at Special Term, entered July 22, 1970 in Albany County, which dismissed petitioner's applications in proceedings under CPLR article 78 to enjoin the Comptroller of the State of New York from discontinuing the practice of check-off of union dues and of deducting insurance premiums from the pay of members of Council 50, AFL-CIO.

In 1969 the Public Employment Relations Board (PERB) conducted elections for State employees represented in five units, resulting in the certification of the

Civil Service Employees Association (CSEA) as the exclusive bargaining agent for all employees in four of those units. Pursuant to article XIV of the Civil Service Law (the Taylor Law) four contracts were negotiated which provided that CSEA should have exclusive payroll deduction of membership dues and insurance premiums for employees, and no other employee organization shall be accorded such privileges. Appellant thereupon instituted these proceedings to enjoin the Comptroller from refusing to make such deductions on behalf of Council 50.

Section 654 of the Executive Law authorizes the Director of the Office of Employee Relations to instruct a State officer, department, board, commission or agency to take such action as needed to implement and administer the provisions of a binding agreement between the State and a duly certified and recognized employee organization. This authority extends both to insurance deductions (L. 1970, ch. 459, §9), and check-off of employee association dues (State Finance Law, §6-a [2]). These statutes clearly indicate that as to a nonrecognized, noncertified, employee association, dues and insurance check-offs are not a vested right (Civil Service Law, §208), but are a privilege which may be withheld at the discretion of the Director of Employee Relations. "Whatever discretion a public employer may have, under the act, to grant the check-off to a minority union not recognized as a bargaining agent * * * the employer is plainly under no obligation to do so." (*Matter of Bauch* v. *City of New York*, 21 N Y 2d 599, 606).

Appellant's contention that the grant of exclusive privileges constitutes employer interference with the administration of an employee organization in contravention of subdivision 1 (b) of section 209-a of the Civil Service

Law, is unfounded. The use of a check-off or deduction system is a time-tested method of implementing union security and in no way interferes with an employee's right to associate with a minority union which is still free to collect dues or premiums by other means.

Since a public employer may make its grant of check-off privileges exclusive to the majority union (*Matter of Bauch* v. *City of New York, supra*), the Director of Employee Relations properly terminated the exercise of check-off privileges by appellant.

The judgment should be affirmed, without costs.

Order of Affirmance

At a Term of the Appellate Division of the Supreme Court, Third Judicial Department, held at the Court House in the City of Albany, New York, commencing on the 19th day of October, 1970.

Present:

HON. J. CLARENCE HERLIHY,
Presiding Justice

HON. WALTER B. REYNOLDS,
HON. LOUIS M. GREENBLOTT,
HON. LAWRENCE H. COOKE,
HON. MICHAEL E. SWEENEY,
Associate Justices.

[SAME TITLES]

The above-named appellant having appealed to the Appellate Division of the Supreme Court, Third Judicial Department, from a judgment of the Supreme Court, Albany County, at Special Term, in proceedings under CPLR Article 78 dismissing petitioner's applications to enjoin the Comptroller of the State of New York from discontinuing the practice of check-off of union dues and of deducting insurance premiums from the pay of members of Council 50, AFL-CIO, which judgment was entered on the 22nd day of July, 1970, in the office of the Clerk of Albany County.

And the said appeals having been argued by William Goffen, Esq., attorney for appellant, by John Q. Driscoll,

Order of Affirmance

Assistant Attorney General, of counsel for respondents and by James W. Roemer, Jr., Esq., of counsel for the intervenor-respondent, and after due deliberation the Court having rendered a decision on the 7th day of December, 1970 (Opinion by Greenblott, J.), it is hereby

ORDERED that the judgment appealed from be and the same hereby is affirmed, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: December 14, 1970

A true copy

JOHN J. O'BRIEN
Clerk

(Seal)

Statutes Involved

Civil Service Law, Article 14 (Taylor Law)

Sec. 200. *Statement of policy*

The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

Sec. 202. *Right of organization*

Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

Statutes Involved

Section 209-a. *Improper employer practices; improper employee organization practices; application*

1. Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such right; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; or (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees.

2. Improper employee organization practices. It shall be an improper practice for an employee organization or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so; or (b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer.

3. Application. In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.

Statutes Involved

Executive Law §654

§654. *Actions by other officers, departments, boards, commissions or agencies*

a. Notwithstanding any inconsistent provision of law, any state officer, department, board, commission or agency, shall, upon written request from the director, take such administrative or other action as is necessary to implement and administer the provisions of any binding agreement between the state and one or more employee organizations representing state employees pursuant to the public employees' fair employment act, as amended. Such action may include, without limitation, the adoption, repeal or amendment of rules, regulations or other procedures. Without prejudice to the rights of an employee organization under such agreement, the opinion of the attorney general shall be conclusive in resolving any disagreement between the director and any such officer, department, board, commission or agency regarding any legal question arising out of such a request, including, without limitation, whether the agreement is binding, whether compliance with the request is necessary to implement or administer the agreement and whether compliance with the request is legally possible.

b. All state officers, departments, boards, commissions and agencies are authorized and directed to provide such other and further assistance, services and data as may be necessary to allow the director properly to carry out his functions, powers and duties.

Statutes Involved

Laws of 1970, Chapter 458, §9

§9. Section three of chapter five hundred eighty of the laws of nineteen hundred thirty-eight, entitled "An act to amend the insurance law, in relation to the definition of group life insurance," as last amended by chapter six hundred thirty-two of the laws of nineteen hundred sixty-four, is hereby amended to read as follows:

§3. The comptroller is hereby authorized to deduct from the salary of any employee of the state such amount as such employee may specify in writing filed with the comptroller for the payment of insurance premiums written on the group plan *or a group life insurance policy issued to a duly organized association of civil service employees pursuant to paragraph (f) of subdivision one of section two hundred four of the insurance law* and to transmit the sums so deducted to the company carrying such insurance. Any such written authorization may be withdrawn by such employee at any time upon filing written notice of such withdrawal with the comptroller. *The foregoing notwithstanding, and subject to the provisions of article fourteen of the civil service law, such deductions and transmittals shall be terminated as to one or more such associations or organizations in accordance with the written directions of the director of employee relations, not more than thirty days after receipt by the comptroller of such directions. The deductions and transmittals which were the subject of such directions shall not thereafter be resumed without the written approval of such director.* (Italics indicates material added.)

Statutes Involved

United States Constitution, Amendment 1

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution, Amendment 14, Section 1

. . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Constitution, Article 1, Section 6

* * *

No person shall be deprived of life, liberty or property without due process of law.

Section 11

No person shall be denied the equal protection of the laws of this State or any subdivision thereof.

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(128-B)

IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1685~~ 70-151

Proceeding No. 1
In the Matter of the Application
of
JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules,

against

PUBLIC EMPLOYMENT RELATIONS BOARD, OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK, and the CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondents.

Proceeding No. 2
In the Matter of the Application
of
JOHN J. KRAEMER, individually and as President of Council 50, AFL-CIO, on behalf of himself and others similarly situated, and COUNCIL 50, AFL-CIO,

Petitioner,

for a judgment under Article 78 of the Civil Practice Law and Rules,

against

OFFICE OF EMPLOYEE RELATIONS, COMPTROLLER OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK, PUBLIC EMPLOYMENT RELATIONS BOARD and the CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondents

RUTH KESSLER TOCH
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Statement of the Case

Since the passage of the New York Public Employees' Fair Employment Act, commonly known as the Taylor Law (Laws of New York, 1967, ch. 392), employees of the State of New York have been grouped into appropriate collective negotiating units as a result of proceedings before the New York State Public Employment Relations Board (PERB).

Following representation elections held during the summer of 1969, the New York Civil Service Employees' Association, Inc. (CSEA) was certified by PERB on September 22, 1969, as the collective negotiating representative of employees in four of the five units involved. Council 50, AFL-CIO, was a defeated contestant in all four elections. Council 82, AFSCME, was the winner in the fifth unit.

Following certification, the State and CSEA entered into collective negotiations and on January 6, 1970, they reached a tentative agreement with respect to each of the four negotiating units. Each of the tentative agreements contained the following provision:

> "CSEA shall have exclusive payroll deduction of membership dues and insurance premiums for employees and no other organization shall be accorded any such payroll deduction privilege".

Pursuant to § 208 of the New York Civil Service Law, a public employer "shall extend to an employee organization certified * * * pursuant to this article the following rights * * * (b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees * * *".

Contracts relating to each of the four units were executed by the State and CSEA on April 20, 1970, and the

provision quoted above, granting exclusive dues deduction privileges to CSEA, appears as § 4.2 of each of such agreements. Following announcement of the tentative agreements and before execution of the contracts, petitioners commenced two separate proceedings under Article 78 of the New York Civil Practice Law and Rules the first relating solely to deduction of insurance premiums and the second relating to deduction of membership dues, seeking judgments declaring that the respondents lacked authority to grant exclusive privileges of payroll deductions to CSEA.

The two proceedings came on for argument together, at a Special Term of the Supreme Court, in the County of Albany, New York and a single judgment was rendered dismissing both petitions. The Court found authority for respondents' actions in Section 6a(2) of the New York State Finance Law, § 654 of the New York Executive Law and § 208 of the New York Civil Service Law and in the decision of the New York State Court of Appeals in *Matter of Bauch* v. *City of New York*, 21 N Y 2d 599 [1968], cert. den. 393 U. S. 834. The judgment was unanimously affirmed on appeal to the New York Appellate Division, Third Judicial Department (Reported in 35 N. Y. A. D. 2d 297). Petitioners appealed to the New York Court of Appeals as a matter of right, on constitutional grounds —equal protection and due process of law. The appeal was dismissed for lack of a substantial constitutional question, again on the authority of *Matter of Bauch*; *supra* (28 N Y 2d 717 [1971]). Thereafter, a motion by petitioners to the New York Court of Appeals for permission to appeal was denied.

Opinions Below

The Memorandum-Decision of Justice RUSSELL G. HUNT at Special Term of the Supreme Court, County of Albany, New York is set forth in the Appendix to the Petition for Certiorari, page A2. The opinion of the New York Appellate Division, Third Judicial Department is set forth at page A5 of the Appendix to the Petition.

Questions Presented

1. Have the petitioners established, as a matter of fact, that they ever had a valid and subsisting insurance premium deduction privilege?

The New York Courts held: "No".

2. May the respondents grant and give effect to an exclusive payroll deduction privilege to the employee organization selected by a majority of State employees to represent them?

The New York Courts held: "Yes".

Reasons for Denying Certiorari

A

The petition herein seeks review of the above-entitled Proceeding No. 1 only. While the two proceedings involve the same issue of law, the first relates, on the surface, to payroll deductions ("checkoff") of insurance premiums for union members while the second relates to the checkoff of union membership dues. In fact, however, as found at Special Term of the Supreme Court, Albany County, there is no essential difference between the two proceedings because petitioner's union never acquired a valid, subsisting insurance premium deduction privilege from the defendant State Comptroller. The Court said:

> "It appears that the Comptroller has never deducted insurance premiums, as such, but, has deducted members' dues and remitted to the Council. The latter has turned over part of the dues to an insurance fund set up by the Council and the balance was retained by it for its general purposes." (Appendix to Petition, p. A3.)

In affirming the decision at Special Term, the New York Appellate Division made no separate finding of fact as to whether or not petitioner's union had a valid insurance premium deduction privilege. Instead, it treated the issue of law raised in both proceedings as applicable to insurance premium deductions as well as to membership dues deduction. Because the petitioner has elected, however, in the petition, to apply for review solely on the question of insurance premium deductions, we submit that the finding of fact that the union had no such deduction privilege remains undisturbed and, accordingly, that the legal question sought to be posed is academic. This Court has declared its policy not to consider academic questions (*Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 [1954]).

The pleadings which instituted this proceeding clearly indicate that the New York State Comptroller deducts the sum of $2.50 bi-weekly from the salary of every Council 50 member upon the authority of a signed payroll deduction card. However, as appears by the affidavit of Vincent J. McArdle, Director of Machine Audit, New York State Department of Audit & Control attached to respondents' Answer below (and reproduced here as Appendix "A") only the top half of the card (the part entitled "Dues—Payroll Deduction Authority") is actually filed with the Comptroller. Upon such authority the Comptroller deducts the sum of $2.50 bi-weekly from the paycheck of

every Council 50 member, without exception, and without any knowledge or concern as to whether or not such member desires or is interested in insurance benefits. The entire amount withheld is transmitted to Council 50, to be used in whatever manner Council 50 may determine.

Petitioners assert, of course, and we need not dispute the fact that the sum of 80 cents is segregated from the bi-weekly dues of each member by Council 50 to be applied to the payment of insurance premiums. This action, in which the Comptroller does not participate and of which he has no official knowledge, does not operate to convert petitioners' dues checkoff into an insurance premium deduction.

B

Petitioners argue that the privilege of payroll deductions granted exclusively to the certified or recognized employee organization, representing a majority of employees, and denied to minority organizations, is a violation of Equal Protection of the Law.

It is well established, however, that in order to be found unconstitutional, a statutory classification among individuals or groups which results in less than equal treatment must constitute "invidious discrimination" lacking a reasonable basis and a permissable objective. (*Williamson* v. *Lee Optical Co.*, 348 U. S. 483 [1954]; *N. Y. Central R. R. Co.* v. *Lefkowitz*, 46 New York Misc 2d 68, mod 28 New York A D 2d 735, affd. 23 N Y 2d 1, [1968], cert. den. 393 U. S. 536). The law does not require that all public facilities be made available equally to all citizens. It does require, however, that any classification which may be made not be invidiously discriminatory. In that light, the cases cited by petitioners are inapplicable. In *Rinaldi* v. *Yeager*

(384 U. S. 305 [1965]) for example, this Court did not hold that transcripts of criminal trials must be made available to all would-be appellants, free of charge, or even that if there is no charge to successful appellants there can be no charge to unsuccessful appellants. Rather, it held that the State of New Jersey could not impose the charge upon unsuccessful appellants who are held in prison and permit unsuccessful appellants who are at liberty (*e. g.* having received a suspended sentence, probation or a fine only) to escape payment. The distinction was obviously discriminatory.

In *Brown* v. *Louisiana* (383 U. S. 131 [19]) the petitioners were effectively denied the use of facilities which were concededly and undoubtedly public—a public library. The decision did not turn on whether or not the petitioners were *entitled* to use the library facilities but, instead, on whether or not they had actually violated a specific "breach of peace" statute and, if so, whether such statute was unconstitutional.

In the present case, a distinction or classification is made between that organization elected by a majority of employees to be their representative and other organizations with lesser, scattered support. Council 50 had an equal opportunity in each of the four negotiating units to become the certified representative, but failed to gain majority support. Having lost the elections, petitioners now complain that they are not accorded equal treatment with the victor.

Thus, the basis for the distinction, we submit, is obvious and reasonable. Its objective is to promote stability and harmony in employee relations by providing to the certified representative certain prerequisites and advantages. The

efficacy of granting such exclusive privileges to the bargaining representative in the interest of stable and harmonious relations has been proven through decades of history in the labor field.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: Albany, New York, June 1, 1971.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondents

RUTH KESSLER TOCH
Solicitor General

JOHN Q. DRISCOLL
Assistant Attorney General

of Counsel

APPENDIX "A"

Affidavit of Vincent J. McArdle, Read in Opposition to Order to Show Cause

SUPREME COURT—STATE OF NEW YORK
COUNTY OF ALBANY

[SAME TITLE]

State of New York
County of Albany—ss

VINCENT J. MCARDLE, being duly sworn deposes and says:

That I am over the age of 21 years and employed as Director of Machine Audit in the New York State Department of Audit and Control.

That in my employment I am charged with the supervision and auditing of payroll deductions from the salaries of State employees, including those voluntary deductions, such as the dues check-off, for which specific written authorization by the employee is required.

That I have examined Exhibit I attached to the petition in the above proceeding and am familiar with the same to the extent which follows:

That the upper half of the form which comprises the exhibit, bearing the heading Dues-Payroll Deduction Authority, and only the upper half, ending at the broken line or perforation immediately below the "Signature of Employee", is filed with the Comptroller of the State of New York and received in my office as authority for payroll deductions.

/s/ VINCENT J. MCARDLE

(Sworn to by Vincent J. McArdle, April 15, 1970)

APPENDIX "A".

PRINT

Last Name	1st Name	Middle Initial	Dept.
Street Address	City	Item No.	Div. or Inst.

DUES

PAYROLL DEDUCTION AUTHORITY

NEW YORK STATE EMPLOYEES COUNCIL 50 (AFSCME) AFL-CIO
17 Dove Street Albany, New York 12210

To the Comptroller of the State of New York:

I, the undersigned do hereby authorize you to deduct from my salary bi-weekly the amount of two dollars and fifty cents ($2.50) for the payment of union dues (Chapter 934, Laws of 1956) and to make any adjustment necessary for the purpose of payment of dues in the amount certified by New York State Employees Council No. 50. If I am not now, or shall in the future cease to be paid on a bi-weekly basis, I authorize you to deduct the amount necessary for payment of my union dues. I understand that this order may be revoked at any time by written notice to you.

AUTHORIZATION FOR REPRESENTATION

I designate Council 50, AFSCME as my sole and exclusive representative for the purpose of negotiating collectively on all matters pertaining to my wages, and/or salary, hours, terms and conditions of employment including the determination of and administration of grievances arising under the terms and conditions of my employment.

Job Title _____ Date _____ Signature of Employee _____

Last Name ..... First Name ..... Middle Initial ..... Local No. .....

Address City, Zone, State Date of Birth (month, day and year)

Name of Beneficiary ..... Relationship .....

Address (Street, City, Zone & State) .....

CHECK ONE BOX ONLY—YOU ARE ELIGIBLE FOR ONLY ONE PLAN:

☐ DEATH BENEFIT PLAN ($1000 first year, $2000 second year, $3000 third year)
☐ SICKNESS & ACCIDENT PLAN ($20 per week for 26 weeks)

Date ..... Signature (Do not print) .....

EXHIBIT I

BEST AVAILABLE COPY